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City of Marion Board of Public Works and Safety:

Corporation Counsel, City of Marion
Marion, Indiana

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No. 27A05-0709-CV-551

Cause No. 27D03-0701-PL-51

MATHIAS, Judge

After the City of Marion Board of Public Works and Safety (the “Board”) ordered a building owned by Downtown City Center, LLC (“DCC”) be demolished, DCC filed a verified complaint appealing the demolition order to Grant Superior Court. The verified complaint named the Board and Bayview Trading Group, L.P. (“Bayview Trading”) as defendants. Bayview Loan Servicing, LLC, (“Bayview Loan”) and Interbay Funding, LLC (“Interbay”) subsequently intervened in the action. The trial court affirmed the demolition order. Bayview Trading, Bayview Loan, and Interbay (collectively “Bayview”) appeal one issue: whether the trial court’s order affirming the demolition order was arbitrary, capricious, an abuse of discretion, or unsupported by the evidence.

We affirm.

Facts and Procedural History

The building in question is located in Marion, Indiana. DCC acquired title on December 31, 2004 from Lonetta M. Norkus-Chochos (“Lonetta”). The title was recorded on February 18, 2005. However, at the time of the transaction, the Real Estate was subject to an adversary proceeding in the United States Bankruptcy Court in the Northern District of Indiana. This proceeding sought to set aside the transfer made by Nicholas Chochos to Lonetta. This issue was subsequently resolved when the bankruptcy petition was dismissed.

DCC obtained a mortgage from Interbay to purchase the building. The mortgage was then assigned by Interbay to Bayview Trading. The building has been in a state of disrepair for a number of years.

In January 2006, a façade on the exterior of the building came loose because of ice and wind damage and began to fall onto the public sidewalk. After an external inspection of the building, the Building Commissioner (“Commissioner”) attempted to locate the owner of the building. He determined that the falling façade constituted an emergency situation and barricaded the sidewalk. After reviewing the file on the building and noting its ongoing problems, the Commissioner determined that the building should be demolished.

DCC appealed that determination, and a hearing was held on February 21, 2006, before the Board. DCC appeared by counsel and by Mike Rigdon (“Rigdon”), a partner in DCC. Bayview also appeared by counsel. At this hearing, Rigdon represented to the Board that DCC would bring the property up to code, commencing with improvements to the property, and would be spending up to \$100,000. Appellant’s App. p. 325. DCC represented that the work to the exterior of the building would be completed by April 1, 2006, and that work could begin immediately. *Id.* at 319. Testimony from DCC’s contractor estimated the cost to repair the exterior of the building at between \$60,000 and \$70,000. *Id.* at 318.

DCC also presented testimony from a structural engineer, Bill Norman (“Norman”) who stated that the Building was structurally sound, but that it could still be considered an unsafe building under the descriptions in Indiana code section 36-7-9-4. Norman testified that the exterior façade was unsafe and potentially dangerous. He also noted that electrical issues may be present and would need to be remedied. Norman

noted the presence of bird waste in the Building and fire damage to five floor joists. Tr. p. 30.

After the hearing, the Board voted to demolish the building but gave DCC the opportunity to repair and renovate the structure. Shortly thereafter, DCC had its contractor set up scaffolding and made some minor repairs to the façade. However, this activity did not last and the scaffolding remained unused at the building for a number of months until it was removed and stored by the City. The repairs were never completed.

On March 6, 2006, DCC filed its complaint in Grant Circuit Court. The cause was transferred to Grant Superior Court. Bayview and Interbay filed a motion to intervene that was granted. On June 27, 2007, a bench trial occurred and all parties filed their Proposed Findings of Fact and Conclusions of Law. On August 30, 2007, the trial court entered its Finding of Fact and Conclusions of Law and upheld the determination of the Board. Bayview appeals.

Discussion and Decision

The trial court is required to review a demolition order under a de novo standard of review. Ind. Code § 36-7-9-8(c) (2006). The trial court “to a limited extent, weigh[s] the evidence supporting the finding of fact by the enforcement authority. The court may negate the finding only if, based upon the evidence as a whole, the finding of fact was arbitrary, capricious, an abuse of discretion, unsupported by the evidence, or in excess of statutory authority.” Kopinski v. Health & Hosp. Corp. of Marion County, 766 N.E.2d 454, 454-55 (Ind Ct. App. 2002). The facts should only be determined by the board and the trial court may not substitute its judgment for that of the board. Id. at 455. Bayview

had the burden of proof at trial because they sought to overturn an administrative order. Id. In reviewing the trial court’s decision, we must determine whether it was arbitrary, capricious, an abuse of discretion, unsupported by the evidence, or in excess of statutory authority. Id.

Indiana Code section 36-7-9-4 describes unsafe buildings and premises, providing in pertinent part:

- (a) For the purposes of this chapter, a building or structure, or any part of a building or structure, that is:
 - (1) in an impaired structural condition that makes it unsafe to a person or property;
 - (2) is a fire hazard;
 - (3) a hazard to the public health;
 - (4) a public nuisance;
 - (5) dangerous to a person or property because of a violation of a statute or ordinance concerning building condition or maintenance; or
 - (6) vacant and not maintained in a manner that would allow human habitation, occupancy, or use under the requirements of a statute or an ordinance; is considered an unsafe building.

Ind. Code § 36-7-9-4 (2006). If a building or premises has been determined to be unsafe then the enforcement authority may issue an order requiring action, including repair or removal of an unsafe building. However, the “ordered action must be reasonably related to the condition of the unsafe premises and the nature and use of nearby properties.”

Ind. Code § 36-7-9-5 (2006). “Where a building can be reasonably repaired, it may be improper to order demolition of the property.” Brown v. Anderson Bd. of Pub. Safety, 777 N.E.2d 1106, 1108, (Ind. Ct. App. 2002), trans. denied (quoting 409 Land Trust v. City of South Bend, 709 N.E.2d 348, 350 (Ind. Ct. App. 1999)).

In Brown, we noted that:

the fact that a property can be repaired is not the dispositive consideration in reviewing a demolition order. Because in theory any building can be repaired, “an equally important consideration is whether the building will be repaired.” “The more relevant question in a case such as this is whether the option of repair will effectively correct the condition considered to be a danger to the public.”

Id. at 1109 (quoting Kollar v. Civil City of South Bend, 695 N.E.2d 616, 622 (Ind. Ct. App. 1998), trans. denied).

Bayview argues that the demolition order should not be affirmed because DCC made some exterior repairs to the façade that allowed the opening of the sidewalk. In addition to the façade problem and other external problems noted by the Commissioner, DCC’s own structural engineer noticed wiring problems, bird waste, fire damage, and water damage to floor joists. However, DCC promised to make all required exterior repairs and despite the number of months that passed after the hearing and the promise, the façade remains unrepaired, with this history, it appears unlikely that DCC will repair the building at all, let alone in an expeditious manner. As noted above, an important determination is “whether the building will be repaired.” Kollar, 695 N.E.2d at 622.

The City has little confidence that the new owners would make repairs, so demolition is a reasonable alternative. Given the trial court’s findings that the Building will continue to stand in disrepair, remain uninhabitable and a public health hazard, and blight the city of Marion, and that the building will continue to fall into further disrepair, we conclude that the trial court’s affirmation of the City’s demolition order was not arbitrary, capricious, an abuse of discretion, or in excess of statutory authority. Appellant’s App. at 11.

Bayview also argues that they did not have sufficient notice of the prior code enforcement actions or conditions requiring the demolition of the building. This argument is unavailing. At the Board hearing, in addition to the demolition order, DCC was given an opportunity to repair the building but made only minor repairs. Notwithstanding whether Bayview and DCC had notice of the issues surrounding the building, they were given adequate opportunity to repair the building, especially when they represented to the Board that necessary repairs would be made in a timely fashion. While Bayview may not have been given the opportunity to repair before the demolition order, they were certainly given that opportunity after the Board hearing.

Finally, Bayview argues that the trial court failed to properly evaluate evidence of “political and emotional bias” associated with the demolition order such that it rendered the order arbitrary or unreasonable. Appellant’s Brief at 11. Bayview glosses over the actions taken at the Board hearing. While the Board did enter a demolition order, the City granted DCC a building permit to begin repairs on the building immediately following the hearing. It appears that the Board did not want to repeat the process if DCC did not comply with the requests to repair the building, and so the Board gave the City the demolition order but gave DCC the opportunity to fix the building and make the demolition order moot.

The City could rescind the demolition order if it wanted to, despite affirmation by the Board. Ind. Code § 36-7-9-6 (2006). However, as noted in further testimony, repairs began, continued for a very short time, and stopped without further action. Bayview has

not presented any evidence that “political or emotional bias” played a role in the Board’s decision. We agree with the trial court that no evidence supports that allegation.

Based on the facts and circumstances before us, we conclude that the Board’s decision regarding the demolition order, and the trial court’s affirmation of that decision was not arbitrary, capricious, an abuse of discretion, unsupported by the evidence, or in excess of statutory authority.

Affirmed.

MAY, J., and VAIDIK, J., concur.